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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THEODORE G. NOLLAN, Defendant and Appellant.	E034426 (Super.Ct.No. RIF 097290) OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed.

Nicholas DePento for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Elizabeth S. Voorhies, Deputy Attorney General, for Plaintiff and Respondent.

In a second amended information defendant Theodore Genaro Nollan was charged with two counts of forcible lewd acts upon a minor under subdivision (b) of Penal Code

section 288[1] and one count of nonforcible lewd acts upon a minor under subdivision (a) of section 288. As to the two forcible lewd acts charges, the jury convicted defendant of the lesser included offenses of nonforcible lewd acts under subdivision (a) of section 288. He was also convicted of the charged nonforcible lewd act upon a minor. The trial court sentenced defendant to three concurrent six-year prison terms.

Defendant raises numerous evidentiary, instructional, and sentencing errors. He also complains there was insufficient evidence supporting the three lewd acts convictions and the trial court violated his due process rights to notice of the charges by allowing the prosecution to amend the information at the close of evidence to expand the time frame of the charged acts. We conclude none of defendant's contentions constitute reversible error and affirm the judgment.

1. Factual Background

In October 2000, the victim, Blake, and his sister, Josette, met defendant while selling candy in their neighborhood. Blake was six years old and Josette was 11. Defendant and his 11-year-old son, Genaro, had just moved into a house up the street from Blake. Blake and Josette lived with their mother (mother), mother's boyfriend, Phillip Griffin, and a family friend, Gloria Vos. Blake and Josette began playing with Genaro, and the two families became friends.

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

Blake liked going to defendant's home to swim and play computer games but often did not get along with Genaro. Defendant periodically complained of Blake's hyperactive behavior. Nevertheless Blake frequently played at defendant's house and generally spent the night there on a weekly basis from October 2000 until May 15, 2001. Blake and Josette stayed overnight more frequently in March 2001, when mother had neck surgery.

When Blake spent the night at defendant's house, he slept in his clothes. The children and defendant would all sleep in defendant's loft. They each had a mattress to sleep on.

Blake testified that defendant began carrying Blake to defendant's bed in the middle of the night. Sometimes Blake would fall asleep on his own mattress but would wake up on defendant's. Sometimes he would wake up with his pants up but unbuttoned. Defendant would unbutton and pull down Blake's shorts and underwear and suck on Blake's penis. On at least one occasion, defendant ran his tongue against Blake's tongue. In the mornings, defendant would kiss Blake's feet or stomach. This conduct occurred every time Blake spent the night at defendant's home. Blake hated these acts. Blake did not tell mother about the acts right after they happened. He said he was going to and then "forgot."

Josette testified that on overnights, everyone slept in defendant's upstairs loft. Sometimes she saw Blake on defendant's bed in the morning. Blake told her he had become scared during the night. Often, Josette noticed that when Blake woke up his

pants were unzipped. Josette thought Blake had been masturbating. Josette saw defendant kiss Blake on the forehead and feet. Defendant rubbed Blake's feet to calm him down. Josette did not observe any improper sexual acts. One time, defendant took a machete away from Blake, and Blake threw a tantrum. At trial, Blake denied he had possessed a machete.

Mother testified that her children frequently visited defendant's home and spent the night there. On May 15, 2001, in response to her children's request to go to defendant's home, mother told Blake and Josette they could no longer go to defendant's house and would lose their swimming privileges there unless they improved their behavior at defendant's and showed him more respect. Defendant had recently complained to mother that her children were being rude and disobedient at his home. Blake blurted out that "Sometimes I don't like going to [defendant's house] . . . because he takes off my socks and pulls down my pants and he sucks on my penis." Mother immediately reported this conversation to the police and the matter was assigned to Corporal Scott Forbes. Blake was six years old at the time. On hindsight, mother recalled several times Blake had told her he did not want to go to defendant's home but she thought this was because he was not getting along with Genaro.

Gloria Vos, an older woman who lived with mother and her children, testified that on May 14, 2001, Blake had said he did not want to go to defendant's home. Vos did not know why. She told Blake to discuss the matter with mother.

On May 22, 2001, Child Protective Services social worker, Laurie Fineman, interviewed Blake regarding the molestation allegations. The video of Blake's interview was played for the jury. Blake said that defendant would take him to defendant's bedroom and kiss him everywhere, including his lips, tummy, jaw, arms, forehead, neck, ear and feet. Defendant also engaged in oral copulation. Initially, Blake said it happened 13 times. The abuse occurred in the morning. One time he tried to call his mother but hung up when Genaro came in defendant's room. Another time he tried to call and defendant took the phone away. Blake did not know how many times he visited defendant's home. He guessed it was around 150,000 times.

On May 23, 2001, defendant was arrested for molesting Blake.

Jimmy Luna, who was 12 years old and a friend of Genaro's, stayed overnight at defendant's home 10 or 12 times when Blake was there. On several occasions, Jimmy overheard Blake tell defendant not to touch him. Jimmy did not know why Blake said this since defendant was not going to touch Blake. Jimmy did not see any improper conduct by defendant. Blake would throw tantrums at defendant's home and cussed at defendant several times.

Genaro testified defendant was a physically affectionate man with others. Genaro never saw Blake in defendant's bed. Blake stole a Game Boy from Genaro and Blake's mother made him return it. Blake also falsely accused Genaro of stealing from him.

Defendant's son, Carlos Rangel, who was 22 years old, testified he first met defendant, his father, when Carlos was six. Carlos began visiting him, including

overnight visits, until Carlos was 13. Visitation ended because of defendant's increased involvement with Genaro. Defendant never kissed Carlos inappropriately. When Carlos was on a high school retreat in 1997, he told a teacher defendant had molested him. Right after the retreat, he told his mother about the molestation and reported it to the Child Protection Services because his teacher asked him to. The matter was not investigated. Carlos testified that his accusation was false. Defendant had not molested him. In May 2001, Carlos told Detective Forbes that defendant had molested him because he thought he had to stick to his story to avoid perjury charges. The tape recording of Carlos's statement taken by Forbes in 2001 was played for the jury.

Carlos's mother, Christine Rangel, testified that when Carlos was born, defendant did not believe he was Carlos's father. When Carlos was five or six, Carlos began visiting defendant. Visitation ended when defendant became more involved with Genaro. When Carlos accused defendant of molestation, Christine could not believe him. Carlos's teacher called a child abuse hotline and a year later someone from Child Protective Services visited. When Carlos was 16, he told her defendant had molested him. Carlos told mother he repeated the accusations to an investigator in the present case because he was scared to change his story.

A videotape of defendant's pre-polygraph interview was also played for the jury. Defendant admitted kissing Blake all over his body around 10 times but denied ever touching Blake's penis. Defendant said he kissed Blake to calm him down when he was out of control. With regard to Carlos, defendant denied Carlos was his biological child.

Defendant said that on one occasion he touched Carlos's penis when Carlos was nine or 10 years old. Carlos's penis had an "adhesion" on it. Defendant rubbed it down with a cotton swab and Vaseline. Carlos had an erection and may have thought the act was masturbation. Defendant also might have inadvertently touched Carlos's penis once while they were playing. Defendant denied committing any sexual acts with Carlos.

At trial, defendant testified that he had retired due to health problems, including heart attacks, and moved to Banning in 2001. Defendant denied any misconduct with Carlos. Whenever Blake and Josette spent the night at his house, it was at mother's request. Blake threw numerous temper tantrums at defendant's home. One time, Blake threw a tantrum after defendant took a machete away from him. The first night Blake spent the night, Blake asked defendant to touch his penis. Defendant never saw Blake with unbuttoned pants in the morning. Defendant admitted he had kissed Blake on his feet, stomach and spine but this was in an attempt to calm down Blake during a temper tantrum. Right after defendant was incarcerated, he could not eat or sleep and, as a consequence, had not slept or eaten for 24 hours before the pre-polygraph interview.

Several lay witness testified to defendant's good character and noted defendant was physically demonstrative but not inappropriately so.

Defense expert witness, Dr. Raymond Anderson, who is a clinical psychologist specializing in assessing and treating sexual offenders, testified he interviewed and tested defendant extensively to determine whether defendant fit the profile of a child abuser. He noted that a review of his case materials would imply defendant suffers from

pedophilia but various tests indicated that he was normal. Dr. Anderson concluded defendant is "sexually and personally normal" and did not fit the profile of a person with deviant sexual interests.

2. Exclusion of Evidence

Defendant contends the trial court abused its discretion in excluding the following evidence: (1) expert testimony regarding improperly suggestive interview techniques used by the social worker interviewing Blake; (2) cultural expert testimony; and (3) evidence of the victim's sexual proclivities. We find no abuse of discretion.

A. Expert Testimony Regarding Improperly Suggestive Interview Techniques

Defendant argues that the court erred in excluding expert testimony regarding the social worker Laurie Fineman's interview techniques pertaining to professional protocol in interviewing children. Defendant sought to impeach Fineman's testimony with expert testimony establishing that Fineman violated child interview protocol by not confronting Blake when he veered off the subject of defendant's misconduct. When Blake was telling the social worker about defendant's misconduct, Blake changed the subject and began talking about fictional matters, such as slaying coyotes. Defendant claims that an expert would testify that Fineman should have kept Blake focussed on defendant's misconduct and directed him back to that topic.

Under Evidence Code section 801, a witness may provide expert opinion relating to a subject that is sufficiently beyond common experience such that the testimony would

assist the trier of fact. (Evid. Code, § 801; see also *People v. Williams* (1997) 16 Cal.4th 153, 195.) The trial court exercises broad discretion in determining the admissibility of expert testimony, and its ruling will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207.)

In the instant case, the trial court appropriately concluded that expert testimony on child interview protocol would not have assisted the trier of fact. There was thus no abuse of discretion in excluding such testimony. Defendant is not claiming that Blake's molestation claim was generated by Fineman posing suggestive questions. Rather, defendant claims that Blake fabricated the molestation. Blake's veering off the subject of defendant's molestation and discussing clearly fictional matters actually supported defendant's defense by establishing that Blake was not always truthful. Expert testimony would not have served any purpose in determining defendant's guilt and would have merely caused unnecessary delay and confusion.

While such testimony may have maligned the manner in which Fineman interviewed Blake, it would not have benefitted the defense. Defendant's defense was premised on Blake's untruthfulness and lack of credibility, not on the social worker's method of interviewing Blake. Since there was no evidence the social worker was responsible for improperly influencing Blake to state false facts or claims, the trial court did not abuse its discretion in concluding expert testimony on child interview protocol was irrelevant and unnecessary.

B. Cultural Expert Testimony

Defendant complains the trial court abused its discretion in precluding a cultural expert from testifying that Hispanic men, such as defendant, tend to be more physically demonstrative in displaying affection than other groups. The trial court summarily rejected this evidence.

There was no abuse of discretion in excluding the proposed testimony. Such evidence is highly questionable in terms of reliability and relevance. In addition, the evidence may have provided broad, misleading generalizations that did not necessarily apply to defendant or the circumstances at issue. The jury is capable of forming its own views as to defendant's behavior and whether it deviates from what is considered acceptable and lawful in our society. Defendant fails to cite any authority, nor are we aware of any, in which such expert testimony of this type has been deemed permissible in a child molestation case.

C. Evidence of the Victim's Sexual Proclivities

Defendant argues the trial court erred in summarily denying his motion in limine under Evidence Code section 782 seeking admission of evidence of Blake's prior sexual conduct. In his motion, defendant sought evidence showing Blake had a propensity to masturbate. Defendant claimed the evidence was relevant to Blake's claim that defendant had touched his penis because it would show Blake learned of the type of sexual behavior Blake accused defendant of committing from sources other than defendant.

We conclude the court appropriately excluded evidence that Blake masturbated. "Evidence Code section 782 provides a procedure for admitting evidence of the complaining witness's sexual conduct in certain sex offense prosecutions, including prosecutions brought under Penal Code sections 286, 288 and 288a. A written motion must be made which includes an offer of proof of the relevancy of the evidence of sexual conduct and its relevancy in attacking the credibility of the complaining witness. If the court finds the offer of proof sufficient it shall order a hearing out of the presence of the jury at which the complaining witness may be questioned. If at the conclusion of the hearing the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.)

In enacting Evidence Code section 782, the Legislature "intended to protect children from embarrassing personal disclosures, regardless of the blameworthiness of the child's conduct." (*People v. Harlan* (1990) 222 Cal.App.3d 439, 447.) In *People v. Harlan, supra,* 222 Cal.App.3d 439, the court concluded evidence of a molestation victim's history of masturbation was inadmissible under Evidence Code section 782 and was properly excluded as irrelevant. (*Id.* at p. 447.)

Defendant's reliance on *People v. Dagget, supra,* 225 Cal.App.3d 751 is misplaced. In *Daggett*, the defendant, who was charged with child molestation, sought to introduce evidence that prior to the charged molestation the victim had been molested by someone else. The *Daggett* court held the trial court erred in excluding the evidence

because it was relevant to casting doubt on the inference that the young child must have obtained sexual knowledge of the charged sexual acts through acts committed by the defendant since a young child normally would not know of such acts. (*Id.* at p. 757.)

In *Daggett* the court explained that "A child's testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted." (*People v. Daggett, supra,* 225 Cal.App.3d at p. 757.)

The instant case is distinguishable from *Daggett* in that masturbation is not a sexual act, such as sodomy or oral copulation, which normally is beyond the knowledge of a six-year-old child, such as Blake. Evidence of Blake's proclivity to masturbate thus was irrelevant.

Furthermore, even if there was error in denying defendant's motion, it was harmless since evidence that Blake masturbated was introduced through the testimony of Blake, Josette, and defendant. (*People v. Watson* (1956) 46 Cal.2d 818.)

3. Admissibility of Pre-Polygraph Interview Statements

Defendant argues the trial court erred in admitting his pre-polygraph interview statement, which was taken without readvising him of his *Miranda*[2] rights. Defendant was arrested on May 23, 2002. At 10:40 a.m., he waived his *Miranda* rights and gave a statement. The next day he agreed to undergo a polygraph examination. At approximately 3:40 p.m., on May 24, 2002, defendant gave a recorded pre-polygraph interview statement. Defendant filed a motion in limine to suppress this statement on the ground he was not advised of his *Miranda* rights before the polygrapher took the statement.

During the pre-polygraph interview, defendant admitted that on about 10 occasions he calmed down Blake by kissing him all over his body, including his spine, head, ears, feet, legs, stomach, and cheeks. He would also rub Blake's back. Defendant denied intentionally touching Blake's penis with his mouth although defendant said he might have accidentally done so, but he did not recall ever doing it.

According to the transcript of the pre-polygraph interview, the polygrapher did not advise defendant of his *Miranda* rights at the inception of the interview. Rather, the polygrapher asked defendant questions for a few minutes, during which defendant admitted kissing Blake. Then the polygrapher reminded defendant of his *Miranda* rights by telling defendant: "My job is to give you a chance to tell me the truth and for me to

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

verify it. You also have a right to say 'you know I don't want [*sic*] talk to you anymore, I want to leave' and we'll leave. Okay, this is the United States of America. 'You' have rights. Even people who are not citizens of this country have rights. The only reason the door was closed is for privacy." Defendant responded, "[r]ight," and then the interview continued, during which defendant again admitted he had kissed Blake all over his body but had not intentionally touched Blake's penis.

During a hearing on defendant's motions in limine, the court disagreed that the pre-polygraph statement should be excluded. The court noted that defendant had been advised of his *Miranda* rights the day before and reminded of his rights again during the pre-polygraph statement.

"Unless preceded by an adequate warning of constitutional rights and a voluntary and knowing waiver thereof, a confession is inadmissible if made during the course of a police investigation which is focused on a particular individual, who is then in police custody. [¶] . . . [¶] The law does not require that a defendant be readvised of his rights prior to each separate interrogation. [Citations.] Subsequent interrogations without *Miranda* warnings are insulated from successful constitutional attack upon a judicial finding of fact that a prior adequate *Miranda* warning was given within a reasonably contemporaneous period of time. [Citation.]" (*People v. Johnson* (1973) 32 Cal.App.3d 988, 997.)

One *Miranda* advisement is thus sufficient to cover subsequent interrogations if the advisement sufficiently informs a defendant of his or her constitutional rights so that

he or she has an understanding of these rights during subsequent interrogations. (*People v. Bennett* (1976) 60 Cal.App.3d 112, 116; *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1006.)

"'[R]eadvisement [of *Miranda* rights] is unnecessary where the subsequent interrogation is 'reasonably contemporaneous' with the prior knowing and intelligent waiver. [Citations.] The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights. [Citations.]' (*People v. Mickle* (1991) 54 Cal.3d 140, 170 [readvisement unnecessary where defendant twice received and twice waived *Miranda* rights 36 hours before].)" (*People v. Lewis* (2001) 26 Cal.4th 334, 386.)

Here, the trial court did not abuse its discretion in allowing defendant's pre-polygraph interview statements. The record supports the trial court's finding that defendant was properly advised of and waived his *Miranda* rights the day before the pre-polygraph interview. Although somewhat belatedly, he was also reminded by the polygrapher during the interview that defendant had the right not to say anything or to stop talking and leave the interview whenever he wanted. Defendant indicated he understood this and did not request to discontinue the interview.

Under these circumstances, we conclude formalized *Miranda* re-advisement was unnecessary. (*People v. Lewis, supra,* 26 Cal.4th at p. 386.) The trial court could reasonably conclude based on such circumstances that defendant had been properly advised of his *Miranda* rights the day before the interview, and was reminded of his rights again midway through the interview the next day. Defendant indicated he understood his rights and was willing to continue talking to the polygrapher. We thus conclude there was no violation of defendant's *Miranda* rights and the court did not err in denying defendant's motion to suppress his pre-polygraph interview statement.

Defendant complains that the trial court erred in not conducting a hearing on the admissibility of his pre-polygraph statement and did not rule on the issue of his physical and mental condition during the interview. Prior to the interview, defendant, who was 62 years old, with a heart condition, had spent the night in jail, unable to sleep or eat. Defendant claims that he was exhausted and confused. The trial court did not address these circumstances when it ruled defendant's interview statement was admissible.

The record indicates the contrary. Although defendant may have been unable to sleep and eat after being incarcerated the day before, there is no evidence this was due to unlawful coercive tactics nor does the record reveal that defendant's physical and mental condition prevented him from comprehending the circumstances of his interview and intelligently responding to questions. To the contrary, defendant's statements during the interview reveal that he was "mentally alert, spoke freely, and 'understood what was going on.'" (*People v. Lewis, supra,* 26 Cal.4th at p. 386.)

We thus conclude that under the totality of the circumstances, there was no prejudicial error in the polygrapher not readvising defendant of his *Miranda* rights before proceeding with the pre-polygraph interview. (*People v. Lewis, supra,* 26 Cal.4th at p. 386; *People v. Mickle, supra,* 54 Cal.3d at p. 170.)

4. Blake's Competence to Testify

Defendant claims that the trial court erred in (1) admitting into evidence Blake's recorded statement to the social worker under Evidence Code sections 352 and 1360 and (2) allowing Blake to testify when he was incompetent to testify and did not understand the duty to tell the truth.

Evidence Code section 1360 provides a hearsay exception for statements made by child victims of sexual abuse. Section 1360 states in relevant part:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

(1) The statement is not otherwise admissible by statute or court rule.

(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability."

Defendant complains that the trial court did not state any findings with regard to whether the time, content, and circumstances of Blake's statement provided sufficient indicia of reliability or whether the statement should be excluded under Evidence Code section 352. The People argue defendant waived these objections to Blake's statement by withdrawing them.

The People moved in limine to admit Blake's videotaped statement to social worker Fineman under Evidence Code section 1360. Defendant filed written opposition and a motion in limine objecting to admission of the videotaped interview on grounds the statement lacked sufficient indicia of reliability under Evidence Code section 1360 and was inadmissible under Evidence Code section 352 because the statement was cumulative and would thus be given undue weight.

"It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.' [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 331.)

Here, during the motion in limine hearing on admissibility of Blake's recorded statement, defendant ultimately agreed to the admissibility of the recorded statement under Evidence Code section 1360 because the statement was beneficial to the defense. Defendant conditioned this on the court's finding Blake was found competent to testify. "Defendant, having withdrawn his objection to the evidence, cannot now complain of its admission." (*People v. Robertson* (1989) 48 Cal.3d 18, 44.)

Defendant argues he did not waive his section 1360 objection. Rather, he conditioned admission of the videotaped statement upon a finding that, under Evidence Code section 701, Blake was competent to testify at trial, and there was no such finding. Furthermore, there was evidence Blake did not possess an appreciation of the obligation to tell the truth.

We reject defendant's arguments. Defendant initially raised the issue of Blake's competency to testify in his motion in limine as a ground for excluding the videotaped interview in the event defendant could not cross-examine Blake. Defendant argued that in all likelihood defendant would not be permitted to cross-examine Blake at trial regarding his videotaped statement because the court would probably find Blake incompetent to testify because he was prone to lie, exaggerate, and fantasize.

Defendant waived his objection to the videotape since his objection was conditional upon the court finding Blake not being competent. The court impliedly found Blake was competent by permitting him to testify at trial. Defendant also waived his objection to Blake's competency by not objecting to Blake testifying at trial.

In addition, the record sufficiently supports a finding that Blake was competent to testify under Evidence Code sections 700 and 701. "'As a general rule, "every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." (Evid. Code, § 700; see Pen. Code, § 1321.) A person may be disqualified as a witness for one of two reasons: (1) the witness is incapable of expressing himself or herself so as to be understood, or (2) the witness is incapable of understanding the duty to

tell the truth. (Evid. Code, § 701, subd. (a).) The party challenging the witness bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of a clear abuse of discretion. [Citation.]'" (*People v. Dennis* (1998) 17 Cal.4th 468, 525, quoting *People v. Mincey* (1992) 2 Cal.4th 408, 444.)

Blake's responses to questions during the interview and at trial regarding his understanding of the duty to tell the truth established he was sufficiently capable of expressing himself, he understood the duty to tell the truth, and he could distinguish between truth and falsity. (Evid. Code, § 701, subd.(a)(2); *People v. Dennis, supra,* 17 Cal.4th at p. 525; *People v. Mincey, supra,* 2 Cal.4th at p. 444.)

We reject defendant's contention the trial court erred in permitting the videotaped interview of Blake and Blake's testimony, without first finding him competent.

5. Admission of Prior Uncharged Sexual Misconduct

Defendant contends the trial court abused its discretion in admitting evidence that defendant sexually abused his six-year-old son, Carlos.

Defendant moved in limine to exclude the evidence under Evidence Code section 352. Defense counsel argued the evidence should be excluded because Carlos recanted, the uncharged conduct was never investigated, it occurred over 10 years ago, and the evidence was highly prejudicial. After weighing the probative and prejudicial nature of the evidence, the trial court ruled it was admissible, reasoning that the evidence was probative and the jury should determine whether the incident actually occurred.

Under Evidence Code section 352 the trial court has the discretion to exclude evidence when its probative value is substantially outweighed by the probability that it will cause undue prejudice, consume undue time, or confuse the jury. A trial court's exercise of discretion under Evidence Code section 352 will only be disturbed if there is a clear showing it was arbitrary, capricious, or patently absurd. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.)

Evidence Code section 1108 provides that, in a criminal action in which the defendant is accused of certain specified sexual offenses, such as the charged offenses, evidence of the defendant's commission of prior sexual misconduct is admissible as long as its admission would not be contrary to Evidence Code section 352. "The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101[;] otherwise . . . section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.)

Under Evidence Code section 1108, "propensity" evidence of a sex offense is no longer unduly prejudicial per se. The trial court must engage in a careful weighing process under Evidence Code section 352. In doing so, trial judges must consider the following factors in determining admissibility of prior offenses: (1) the prior crime's nature, relevance, and remoteness; (2) degree of certainty of its commission; (3) likelihood of it confusing, misleading, or distracting the jurors from the main inquiry; (4) its similarity to the charged offense; its likely prejudicial impact on the jurors; (5) the

burden on the defendant in defending against the uncharged offense; and (6) the availability of less prejudicial alternatives. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

Defendant argues that the evidence of the uncharged prior sexual misconduct was weak, speculative, different in nature, and old, and therefore its probative value was substantially outweighed by the obvious prejudice. But defendant's sexual misconduct described by Carlos was quite similar in nature to the charged conduct in the instant case. Also, defending against the uncharged offense was not unduly burdensome since Carlos recanted the allegation and defendant had an opportunity to cross-examine him at trial. And even though Carlos recanted the accusation, there was a great deal of evidence corroborating his initial molestation allegation, including his recorded statement to Detective Forbes and testimony that he reported the molestation to his high school teacher and his mother, and he called the child abuse hotline.

The trial court appropriately weighed the probative and prejudicial nature of the evidence and permitted the evidence, reasoning that the jury should be permitted to determine whether the prior sexual abuse actually occurred. Evidence of defendant molesting Carlos, if believed was highly relevant and probative. We thus cannot say the court abused its discretion in allowing the jury to consider the evidence and decide whether the prior sexual misconduct actually occurred.

6. Instruction on Lesser Included Offense

Defendant complains that the trial court erred in not instructing the jury on sexual battery under section 243.4, subdivision (d) as a lesser included offense of the section 288 lewd conduct offenses.

The court gave CALJIC Nos. 10.41 and 10.42, which instructed the jury on committing a lewd act with a child in violation of section 288, subdivision (a) (count 3) and committing a lewd act with a child with force in violation section 288, subdivision (b)(1) (counts 1 & 2). The court also instructed the jury that the section 288, subdivision (a) crime (lewd conduct without force) was a lesser included offense of the section 288, subdivision (b) crimes charged in counts 1 and 2. The trial court rejected defendant's request to provide instruction on sexual battery (CALJIC No. 16.145) as a lesser included offense of lewd conduct.

"[E]ven absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 118.) An offense is necessarily included if the greater offense as defined by statute cannot be committed without committing the lesser, or if the greater offense as described in the accusatory pleading encompasses all the elements of the lesser. (*People v. Wright* (1996) 52 Cal.App.4th 203, 208.)

Here, instruction on sexual battery as a lesser included offense was not required since not all of the elements of a section 243.4, subdivision (d) sexual battery are

included in a section 288 offense. For instance, a section 288 offense does not require the touching of an "intimate part," which is defined in section 243.4 as "the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (§ 243.4.)

Defendant states in his appellant's rebuttal brief that he intended to refer to the former subdivision (d), which is now subdivision (e). Section 243.4 was amended in 2002, causing former subdivision (d) to be redesignated as subdivision (e)(1). Defendant's list of requested jury instructions lists lesser included offense instruction, CALJIC No. 16.145, which refers to subdivision (e) of section 243.4. This indicates defendant intended to rely on former subdivision (d), which was in effect at the time of the charged offense.

But regardless of the applicable subdivision, instruction on sexual battery as a lesser included offense was not required. Current subdivision (e)(1), as well as subdivision (d), requires the perpetrator to touch an "intimate part" of the victim, which is defined in section 243.4 as "the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." This is not a required element of a section 288 offense.

Also, subdivision (e)(1) requires that the touching is against the will of the victim and this is not required in a section 288, subdivision (a) offense.

Neither the statutory elements of the section 288 offenses or the facts, as alleged in the amended information, include all the elements of the lesser sexual battery offense. (*People v. Birks, supra,* 19 Cal.4th at p. 117.) The section 243.4 offense, under either the current subdivision (d) or (e)(1), is not a lesser included offense to the charged section

288 offenses. The trial court thus properly rejected instruction on sexual battery as a lesser included offense.

7. CALJIC No. 2.40

Defendant contends the trial court improperly modified CALJIC No. 2.40 (traits of character of defendant) to include the following bracketed sentence from the official judicial form instruction: "However, evidence of good character for certain traits may be refuted or rebutted by evidence of bad character for those same traits." The instruction, as given to the jury, further stated, "Any conflict in the evidence of defendant's character and the weight to be given to that evidence is for you to decide."

CALJIC No. 2.40 is premised on Evidence Code section 1102, which provides:

"In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

Evidence Code section 1102 allows the prosecution to rebut evidence of good character by presenting bad character evidence. The 1995 Law Revision Commission Comment on Evidence Code section 1102 states that, "Under Section 1102, the accused in a criminal case may introduce evidence of his good character to show his innocence of

the alleged crime--provided that the character or trait of character to be shown is relevant to the charge made against him. . . . Sections 1101 and 1102 make it clear that the prosecution may not, on its own initiative, use character evidence to prove that the defendant had the disposition to commit the crime charged; but, if the defendant first introduces evidence of his good character to show the likelihood of innocence, the prosecution may meet his evidence by introducing evidence of the defendant's bad character to show the likelihood of guilt."

At trial, the prosecution requested adding the bracketed sentence, which refers to bad character evidence, on the ground evidence of defendant's guilt constituted a sufficient basis for including it. Defendant objected at trial to adding the sentence. Defendant argues that evidence of guilt alone is not sufficient to support the sentence.

The People agree in their respondent's brief that including the sentence on bad character evidence was improper since evidence of guilt alone is not a sufficient basis for adding the bracketed portion of the instruction on bad character evidence. However, the People argue that giving the instruction as modified was harmless error. We agree.

It is not reasonably probable that, had the sentence regarding bad character evidence been omitted, the jury would have returned a more favorable verdict. "'"[S]uch an error is usually harmless, having little or no effect 'other than to add to the bulk of the charge.'" [Citation.] There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's prejudice. [Citations.]'" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 238; see also *People v.*

Watson, supra, 46 Cal.2d at p. 836; *People v. Robinson* (1999) 72 Cal.App.4th 421, 428-429.) Such risk of prejudice from the instruction is highly unlikely and thus the instruction was not prejudicial error. (*Ibid.*)

8. CALJIC No. 2.51

Defendant complains that the trial court erred in refusing to give CALJIC No. 2.51, which states in part, "absence of motive may tend to show the defendant is not guilty." The trial court stated that it would not give the motive instruction because instruction on motive was included in the instructions defining the charged crimes, CALJIC Nos. 10.41 and 10.42.

CALJIC No. 2.51 states:

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty."

CALJIC Nos. 10.41 and 10.42, which state the elements of the lewd conduct crimes under section 288, subdivisions (a) and (b), state that specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the perpetrator or victim is required.

Defendant argues that since motive and intent are not equivalent, the court should have given CALJIC No. 2.51. Defendant asserts that he presented evidence that he lacked pedophilia tendencies, which established a lack of motive. The motive instruction

regarding absence of motive would have thus been beneficial in establishing he was not guilty.

Regardless of whether CALJIC No. 2.51 should have been given, the absence of the instruction was not prejudicial. In *People v. Petznick* (2003) 114 Cal.App.4th 663, 685, the court explained that the motive instruction clarifies that motive is not an element of a crime. "'Motive describes the reason a person chooses to commit a crime.' [Citation.] It is not synonymous with intent." The *Petznic* court further notes, however, that "Although in law we recognize this distinction, in common usage the terms are often used interchangeably." (*Ibid.*) CALJIC No. 2.51 points out both that motive (unlike intent) need not be proved and that, if there is absence of motive, this may tend to show defendant is not guilty.

But this can be reasonably inferred from the instructions defining the elements of the charged crimes. The jury was instructed that each of the elements of the charged offenses must be proven, including specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires. The absence of any of the elements of the charged crimes would establish a lack of guilt. Thus, it was sufficiently clear to the jury that evidence that defendant did not have pedophilia tendencies supported a finding defendant did not have the requisite intent to arouse, appeal to, or gratify the lust, passions, or sexual desires, which in turn would tend to show defendant was not guilty.

In light of the instructions as a whole, it is not reasonably probable the verdict would have been any different had the court instructed the jury that absence of motive

tended to show defendant was not guilty. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Robinson, supra,* 72 Cal.App.4th at pp. 428-429.)

9. Information Amendment

Defendant contends that allowing the prosecution to amend the information at the close of evidence violated his due process right to notice of the charges against him. The original information and first amended information alleged the charged offenses occurred in March 2001, when Blake spent several nights at defendant's house while his mother was undergoing and recovering from neck surgery. The amendment at the close of the evidence expanded the time frame to between October 2000 and May 15, 2001, which was the period of time during which Blake had gone over to defendant's home.

The prosecutor argued the amendment was supported by the evidence presented at the preliminary hearing and at trial and thus defendant was on notice of the time frame, as amended. Defense counsel objected to the amendment on the ground the defense had focused on misconduct occurring in March 2001. In response, the trial court stated that defendant did not limit his defense to conduct in March. Rather defendant claimed none of the misconduct occurred at any time during the time defendant was acquainted with Blake. Defendant argued he did not commit any sexual misconduct whatsoever at any time. The court noted that expanding the time frame thus did not change defendant's defense. Accordingly, the trial court granted the requested amendment and ordered the information amended by interlineation to conform to the evidence presented at trial.

The People argue defendant waived his objection to the amendment by not objecting at trial on due process grounds. There was no waiver. Defendant adequately objected to the amendment.

The People further argue on the merits that defendant failed to demonstrate that the amendment prejudiced his substantial rights. The People note defense counsel conceded the defense would not have been any different had the information been amended sooner. In addition, evidence that the charged offenses occurred between October 2000 and May 15, 2001, was presented at the preliminary hearing and thus defendant was put on notice of the need to prepare and present a defense to misconduct throughout this period.

Section 1009 authorizes the trial court to "permit an amendment of an . . . information . . . at any stage of the proceedings . . . ." It further provides that an information cannot be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination." The trial court must deny leave to amend "if the amendment would prejudice the defendant's substantial rights. [Citations.]" (*People v. Birks, supra,* 19 Cal.4th at p. 129.) "An amendment to the information may be made as late as the close of trial if no prejudice is shown. [Citation.]" (*People v. Villagren* (1980) 106 Cal.App.3d 720, 724; accord, *People v. Witt* (1975) 53 Cal.App.3d 154, 165, cert. den. (1976) 425 U.S. 916.)

Under section 1009, the test applied is "'whether or not the amendment changes the offense charged to one not shown by the evidence taken at the preliminary

examination. [Citation.]' [Citation.]" (*People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, 764, quoting *People v. Spencer* (1972) 22 Cal.App.3d 786, 799.) """. . . [A]n amendment cannot be made under the section [Pen. Code, § 1009] if it prejudices the substantial rights of a defendant; and inasmuch as he is furnished with a copy of the transcript of the proceedings at the preliminary hearing, he has notice of any charge that under the section may be placed against him by amendment of the information. The section itself preserves the substantial rights of the party to a trial on a charge of which he had due notice, and that is all the Constitution requires."" (*People v. Brown* (1973) 35 Cal.App.3d 317, 322-323, quoting *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1020, quoting *People v. Roth* (1934) 137 Cal.App. 592, 608.)

Granting a motion to amend an information to correct defects or insufficiency is a matter within the sound discretion of trial court. The trial court's discretion, in granting a motion to amend, "'will not be disturbed on appeal in the absence of showing a clear abuse of discretion.' [Citation.]" (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

Here, there was no surprise in expanding the time frame of the charges because the theory of the prosecution and the evidence the prosecution proffered at trial was known to the defense from the time of the preliminary hearing, if not from the outset of the proceedings. Regardless of the time, the defense would have been the same. The trial court thus did not abuse its discretion in concluding there was no prejudice to the defense in amending the pleadings to conform to the evidence that the charged misconduct occurred throughout the expanded time frame.

10. Sufficiency of Evidence

Defendant challenges the sufficiency of evidence supporting his three section 288, subdivision (a) convictions.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Hill* (1998) 17 Cal.4th 800, 848-849.)

The elements of a violation of section 288, subdivision (a) are that the defendant touched the body of a child; the child was under the age of 14 years, and the touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions or sexual desires of that person or the child. (§ 288, subd. (a); see also CALJIC No. 10.41.) Circumstances that indicate sexual intent include the nature of the act, extrajudicial statements, the relationship between perpetrator and victim, commission of other lewd acts, use of coercion or deceit, attempts to avoid detection or maintain secrecy, and the age of the perpetrator. (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 299.)

Defendant argues that Blake's testimony that he was molested, while in a small room with between one to four other children present, is improbable and uncorroborated. In addition, the evidence showed that Blake was prone to lie whereas the alleged

misconduct was completely out of character for defendant, who was 62 years old and had no criminal history. In addition, Dr. Anderson's expert testimony that defendant displayed no characteristics of pedophilia was unrefuted. Carlos's allegation that defendant had molested him was recanted. Finally, defendant repeatedly denied committing any molestation.

Although this evidence may support an acquittal, there was also substantial evidence supporting defendant's convictions. This court is not permitted to re-weigh the evidence, determine issues of credibility, or make factual determinations. We may not reverse defendant's conviction simply because differing inferences and findings could have been made by the trier of fact. "[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

Here, there was substantial evidence supporting defendant's convictions. Blake testified defendant molested him every time he spent the night at defendant's home. Blake also stated this during his recorded interview by social worker, Fineman. Josette testified that she frequently awoke in the middle of the night and found Blake on defendant's bed even though he had his own mattress to sleep on. She wondered why he was lying there and why his pants were undone. She was also present when Blake told their mother he did not want to go to defendant's house because defendant had been

molesting him. Defendant admitted in his pre-polygraph statement that he kissed Blake all over his body including his spine, cheeks, head, ears, belly, feet, legs, He did this around 10 times.

There was also evidence that defendant had molested his own son, Carlos, when Carlos was between the ages of eight and 13. Carlos reported the molestation in 1997 to a trusted teacher, to his mother, and to Child Protective Services. He also told Police Detective Forbes in 2001 that defendant had molested him. Carlos's reported acts of molestation were very similar in nature to those involving Blake.

Blake's mother testified consistent with Josette and Blake's testimony regarding Blake reporting the molestation. She immediately reported the molestation to the police. Blake also told mother's boyfriend, Phillip Griffin, defendant had been touching him in inappropriate places. And Psychologist Dr. Rath concluded in her report that defendant is a pedophile.

While there was evidence refuting testimony of these witnesses, the evidence supporting defendant's convictions was sufficient to support the jury's findings that defendant molested Blake in violation of section 288, subdivision (a).

11. Reliance on Erroneous Probation Report

Defendant challenges the trial court's ruling denying probation and sentencing him to a six-year prison term. Specifically, he complains the trial court violated his due process rights to a fair sentencing proceeding by denying probation based on an erroneous probation report recommending prison rather than probation. Defendant

claims the probation officer's recommendation was based on two incorrect assumptions: (1) defendant lied when he testified he did not have knowledge of the 1997 molestation charge involving Carlos and (2) Dr. Rath concluded defendant was a pedophile.

Defendant argues defendant did not lie regarding the 1997 molestation allegation and the probation officer erred in relying on Dr. Rath's conclusion defendant was a pedophile since several other experts concluded defendant was not a pedophile and their opinions were more reliable and accurate. Dr. Rath's opinion was based on an informal interview with virtually no diagnostic testing, unlike the opinion testimony of the other experts. Defendant claims that the court's reliance on this misinformation compromised the fundamental fairness of the sentencing proceeding. We disagree.

Two days after defense counsel received the probation report, defendant filed a supplemental sentencing memorandum asserting that, contrary to the probation officer's erroneous assumption, he had truthfully denied knowing of Carlos's molestation claim. As a consequence of the probation officer's apparent misunderstanding, the trial court continued the sentencing hearing to permit the probation officer to consider revising her sentencing recommendation. The court noted it had considered the recommendation but was not bound by it. The probation officer submitted a supplemental memorandum stating that she had confirmed her initial conclusion that defendant had lied about having no knowledge of Carlos's prior molestation allegations and thus affirmed her sentencing recommendation. Defendant refuted the probation officer's supplemental memorandum in a second supplemental sentencing memorandum. Also, during the sentencing hearing,

defense counsel argued at length that defendant did not have knowledge of Carlos's prior molestation claim.

Following argument on sentencing, the trial court stated: "The Court is going to deny probation for the following reasons: The victim was vulnerable, and [defendant] did inflict physical and/or emotional injury -- at least was definitely an active participant. It also appears that this was a well thought-out -- this wasn't a spur-of-the-moment happening. I heard all the evidence in this case. It will be judgment and order of the Court that probation be denied."

Since the trial court acknowledged the probation officer's misunderstanding regarding the 1997 prior allegation and continued the sentencing hearing until the probation officer could reconsider her recommendation, there was no sentencing unfairness or harm that can be attributed to such misunderstanding. Furthermore, the court proceedings provided defendant with ample opportunity to challenge the probation officer's conclusion defendant lied and her reliance on Dr. Rath's report and conclusions. The record reflects that the trial court considered defendant's challenges to the probation officer's sentencing recommendations. The trial court's statement of its grounds for denying probation does not indicate the court ultimately relied on either of the factors defendant claims were inaccurate. There was no violation of defendant's due process rights warranting setting aside defendant's sentence.

12. Discretionary Denial of Probation

Defendant contends the trial court abused its discretion in denying him probation and sentencing him to six years in state prison.

The decision to grant or deny probation rests within the broad discretion of the trial court, and that decision will not be disturbed on appeal "*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) A trial court's discretion in granting or denying probation is limited by the criteria set forth in California Rules of Court, rule 4.414.[3] (*People v. Golliver* (1990) 219 Cal.App.3d 1612, 1617.)

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[3] Rule 4.414 provides: "Criteria affecting the decision to grant or deny probation include:

"(a) Facts relating to the crime, including: [¶] (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime. [¶] (2) Whether the defendant was armed with or used a weapon. [¶] (3) The vulnerability of the victim. [¶] (4) Whether the defendant inflicted physical or emotional injury. [¶] (5) The degree of monetary loss to the victim. [¶] (6) Whether the defendant was an active or passive participant. [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur. [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant. [¶] (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

"(b) Facts relating to the defendant, including: [¶] (1) Prior record of criminal conduct; whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct. [¶] (2) Prior performance on probation or parole and present probation or parole status. [¶] (3) Willingness to comply with the terms of probation. [¶] (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors.

[footnote continued on next page]

Defendant argues the weight of the criteria listed in California Rules of Court, rule 4.414 supports granting probation. For instance, defendant did not use a weapon; he had virtually no prior criminal history; he remained free on bail pending resolution of this case and sentencing; he demonstrated a willingness to comply with his probation terms; he had substantial family ties and community support; defendant is elderly (64 years old at the time of sentencing) and in fragile health; his minor child, Genaro, for whom defendant is his sole source of support, would be adversely affected; and two psychologists determined he would not be a danger to others. (Cal. Rules of Court, rule 4.414.) With the exception of Dr. Rath's evaluation, all of the psychological evaluations conclude defendant is neither a pedophile nor a danger to the community.

The trial court stated at the sentencing hearing that it had heard all of the evidence and rejected probation on the grounds the victim was vulnerable; defendant inflicted physical and/or emotional injury as an active participant; and the offenses were well thought-out, not "spur-of-the moment" occurrences. Defendant claims these reasons do not provide a sufficient basis for denying probation and sentencing him to a six-year prison term.

Even though defendant cites numerous factors supporting probation and the trial court cited only a few factors in support of its ruling denying probation, this does not

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[footnote continued from previous page]

[¶] (5) The likely effect of imprisonment on the defendant and his or her dependents. [¶] (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction. [¶] (7) Whether the defendant is remorseful. [¶] (8) The likelihood that if not imprisoned the defendant will be a danger to others."

[footnote continued on next page]

demonstrate court error in imposing a prison term rather than probation. A single aggravating factor may outweigh several mitigating factors. (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615.) The trial court has wide discretion in balancing aggravating and mitigating factors "in qualitative as well as quantitative terms." (*People v. Roe* (1983) 148 Cal.App.3d 112, 119.)

We find no abuse of discretion in the court denying probation. Given there was sufficient evidence to support court findings that defendant molested a vulnerable victim on numerous occasions and did so in a calculated way, causing the victim to suffer emotional injury requiring counseling, we conclude the court did not abuse its discretion in denying probation.

13. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.

[footnote continued from previous page]